UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EVELYN E. SANCHEZ, Plaintiff	)	
v.	)	Civil Action No. 06-30146-KPN
MICHAEL J. ASTRUE, Commissioner of the Social Security Administration,[1] Defendant	)	

MEMORANDUM AND ORDER WITH REGARD TO PLAINTIFF'S MOTION TO REVERSE and DEFENDANT'S MOTION TO AFFIRM THE DECISION OF THE COMMISSIONER (Document Nos. 10 and 11)
June 14, 2007

NEIMAN, C.M.J.

This is an action for judicial review of a final decision by the Commissioner of the Social Security Administration ("Commissioner") regarding an individual's entitlement to Supplemental Security Income ("SSI") disability benefits. The matter is before the court pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). Evelyn E. Sanchez ("Plaintiff") contends that the Commissioner's decision denying her such benefits -- memorialized in a February 23, 2006 decision of an administrative law judge -- is not supported by substantial evidence and is predicated on errors of law. Plaintiff has moved to reverse the decision and the Commissioner, in turn, has moved to affirm.

With the parties' consent, this matter has been assigned to the undersigned for

[1] Michael J. Astrue became the Commissioner of Social Security on February 12, 2007, and is substituted for Jo Anne B. Barnhart as the defendant in this action pursuant to Fed. R. Civ. P. 25(d)(1).

all purposes, including entry of judgment. *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73(b). For the reasons set forth below, Plaintiff's motion will be denied and the Commissioner's motion will be allowed.

I. STANDARD OF REVIEW

The Commissioner's decision is conclusive if grounded in substantial evidence. *See* 42 U.S.C. §§ 405(g) and 1383(c)(3). Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Rodriguez v. Sec'y of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981). The Supreme Court has defined substantial evidence as "more than a mere scintilla." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Thus, even if the administrative record could support multiple conclusions, the court must uphold the Commissioner's decision "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support [her] conclusion." *Ortiz v. Sec'y of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991).

The resolution of conflicts in evidence and the determination of credibility are for the Commissioner, not for doctors or the courts. *Rodriguez*, 647 F.2d at 222; *Evangelista v. Sec'y of Health & Human Servs.*, 826 F.2d 136, 141 (1st Cir. 1987). A denial of benefits, however, will not be upheld if there has been an error of law in the evaluation of a particular claim. *See Manso-Pizarro v. Sec'y of Health & Human Servs.,* 76 F.3d 15, 16 (1st Cir. 1996). Ultimately, the court retains the power, in appropriate circumstances, "to enter . . . a judgment affirming, modifying, or reversing the Commissioner's decision," or to, "remand[] the cause for a rehearing." 42 U.S.C. §

405(g).

II. BACKGROUND

Plaintiff, born on November 20, 1964, in Puerto Rico, has an eighth grade education and little work history. (Administrative Record ("A.R.") at 147, 398.) She is able to read and write in Spanish, but unable to communicate in English. (A.R. at 20.) Plaintiff has worked in a variety of jobs, holding each position for no longer than three to four months. (A.R. at 413, 424.) She currently resides in Holyoke, Massachusetts. (A.R. at 410.)

A. Medical History

Plaintiff claims that her disability due to "nerves" began on June 1, 2002. (A.R. at 147, 154.) Treatment records from the Holyoke Health Center from August of 1995 through February of 2005 show Plaintiff suffered from occasional bouts of depression. (A.R. at 20.) Plaintiff had also been seen at the Brightwood Riverview Health Center for a number of years for general medical issues. (A.R. at 245-82.)

On December 13, 2002, Robert Selvarajah, M.D., examined Plaintiff at the Holyoke Health Center and reported that she had previously been a patient there and was taking Zoloft for depression. (A.R. at 207.)[2] The following January, Dr. Selvarajah noted that Plaintiff was alert and oriented and recommended that Plaintiff continue on Zoloft and "try to find a job as soon as possible." (A.R. at 205.)

On January 27, 2003, Bruce Goderez, M.D., from the Disability Determination

[2] Zoloft (Sertraline) is used to treat depression, panic attacks, obsessive compulsive disorders, post-traumatic stress disorder, and social anxiety disorder (social phobia). *See* www.webmd.com (last visited June 14, 2007).

Services ("DDS"), examined Plaintiff and completed a report for the Social Security Administration. (A.R. at 285.) Dr. Goderez observed that Plaintiff's speech was normal, her mood was neutral, and her affect was of good range and appropriate to the conversation. (*Id.*) She was oriented to three spheres, her cognition was intact, her intellectual functioning was in the average range, and she exhibited no signs of thought derailment, psychosis, paranoia or delusions. (*Id.*) Plaintiff also denied any history of suicidality and any auditory hallucinations. (*Id.*) Dr. Goderez concluded that Plaintiff was "inherently a relatively intelligent individual" who was no longer abusing alcohol and could be rehabilitated depending on her course of treatment. (A.R. at 285-88.)

On February 4, 2003, Dr. A. Lazerson of the DDS completed a Mental Residual Function Capacity Assessment and found Plaintiff markedly limited in her ability to interact appropriately with the general public. (A.R. at 289-290.) He also found Plaintiff moderately limited in her ability to concentrate when working in coordination with others and completing a normal workday. (A.R. at 290.) Dr. Lazerson also determined that Plaintiff was moderately limited in accepting instructions from supervisors and responding to changes in the work setting. (*Id.*) Finally, he indicated that Plaintiff could carry out instructions and maintain concentration for up to two hours and could adapt to her work setting, but that she would have difficulty tolerating confrontation or criticism. (A.R. at 292.)

On November 10, 2003, Plaintiff returned to the Holyoke Health Center with complaints of panic attacks. (A.R. at 202.) Michael Moriarty, M.D., examined Plaintiff and noted that she did not appear depressed and showed no evidence of any thought

disorder. (*Id.*) He re-prescribed Zoloft, as Plaintiff had stopped taking her medication about six months earlier, and recommended that she follow up with her primary case physician. (*Id.*) Shortly thereafter, on November 26, 2003, Dr. Selvarajah documented that Plaintiff was not attending counseling services as was previously recommended. (A.R. at 201.) Plaintiff was given Lexapro samples, again instructed to go to counseling services, and scheduled for another examination in six weeks. (*Id.*)[3]

On December 9, 2003, Luz Martinez, who is only identified as a "worker" at the Massachusetts Department of Transitional Assistance, completed a medical assessment form regarding Plaintiff's physical and mental impairments. (A.R. at 335.) Ms. Martinez noted there were no limitations in Plaintiff's ability to make simple work-related decisions. (A.R. at 340.) She stated, however, that there were slight limitations in Plaintiff's ability to remember and carry out simple instructions, to maintain attention and concentration in order to complete tasks in a timely manner, to interact appropriately with co-workers and supervisors, to work at a consistent pace without extraordinary supervision, and to respond appropriately to changes in her work routine or environment. (*Id.*)

On January 9, 2004, Brian O'Sullivan, Ph.D., also of DDS, performed a second Mental Residual Functional Capacity Assessment. (A.R. at 312-13.) Dr. O'Sullivan found that Plaintiff had no apparent limits in her understanding and memory, social interaction, and adaptation abilities, but noted that she might experience increased

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[3] Lexapro (Escitalopram)) is used in the treatment of depression and generalized anxiety disorder. *See* www.webmd.com (last visited June 14, 2007).

anxiety or depression lasting about a month, which could result in variable concentration and energy. (A.R. at 313-15.)[4]

Plaintiff continued to visit the Holyoke Health Center from January through March of 2004 for complaints of panic attacks and depression. (A.R. at 190-99.) In July of that year, Plaintiff saw Kirsten Berman, M.D., for depression and chest pains. (A.R. at 376.) Dr. Berman reported that Plaintiff had run out of Lexapro two weeks earlier and, at times, had thoughts that she would hurt herself. (*Id.*) Plaintiff was given a prescription for Prozac and was told to follow up with her counselor. (A.R. at 377.)[5] Early the following year, on February 17, 2005, Alejandro Esparza-Perez, M.D., evaluated Plaintiff and observed that she was doing well on her own and that she had stopped seeing a psychiatrist. (A.R. at 374.) Dr. Esparza-Perez noted, however, that Plaintiff had stopped taking her prescribed Prozac and refilled her prescription. (*Id.*)

Plaintiff went to the Mount Tom City Clinic on October 21, 2005, and was evaluated by Charna Schliapnik, M.S., L.C.S.W. (A.R. at 392-400.) Plaintiff had previously received treatment at the clinic and was hospitalized for depression and a suicide attempt in 1991. (A.R. at 398.) Ms. Schliapnik documented that Plaintiff was feeling depressed, having nightmares, and hearing voices, but was not taking any medication. (A.R. at 398-99.) She observed that Plaintiff appeared anxious, restless

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[4] A third DDS psychiatric review was completed by Joseph Litchman, Ph.D., on May 21, 2004. (A.R. at 356-57.) He determined, however, that there was insufficient evidence in the record to make a proper assessment. (*Id.*)

[5] Prozac (Fluoxetine) is used in the treatment of depression, obsessive-compulsive disorder, and panic attacks. *See* www.webmd.com (last visited June 14, 2007).

and agitated but was also friendly, cooperative and oriented. (A.R. at 399.) Ms. Schliapnik reported that Plaintiff's symptoms of depression seemed moderate to severe and that she should be closely monitored for suicide. (*Id.*) She also noted treatment would be difficult as Plaintiff had stated that she was not willing to see a psychiatrist, although she did agree to think about it. (*Id.*)

Ms. Schliapnik sent a handwritten letter to the administrative law judge dated November 4, 2005. In it, she wrote that Plaintiff "suffers from Major Depressive Disorder with psychotic feature[s]" and that her "symptoms are severe and greatly affect her functioning." (A.R. at 391.)

B. Procedural History

On October 30, 2003, in the midst of these benchmarks, Plaintiff applied for SSI benefits, alleging a disability as of June 1, 2002. (A.R. at 147, 154.)[6] Her application was denied initially and upon reconsideration. (A.R. at 34-36, 38-40.) She then requested and was granted a hearing before an Administrative Law Judge ("ALJ"). The hearing was held on November 14, 2005, *i.e.*, approximately ten days after Ms. Schliapnik's letter, and then continued at Plaintiff's request to January 5, 2006, at which time Plaintiff was represented by counsel. (A.R. at 401-33.) Both Plaintiff and a vocational expert testified. (See *id.*)

In a decision dated February 23, 2006, the ALJ found that Plaintiff was not disabled as defined in the Social Security Act. (A.R. at 17-23.) She appealed the

[6] Plaintiff previously applied for SSI benefits on October 15, 2002, in which she also alleged an onset date of June 1, 2002. That application was denied on February 6, 2003, and Plaintiff did not appeal. (See A.R. at 27-33, 95-100.)

decision to the Appeals Council, which denied review on May 19, 2006, making the ALJ's decision the final decision of the Commissioner. (A.R. at 8.) Plaintiff then commenced the instant action.

III. DISCUSSION

An individual is entitled to SSI benefits if, among other things, she is financially needy and under a disability. *See* 42 U.S.C. § 423(a)(1)(A) and (D). Plaintiff's need is not at issue.

A. DISABILITY STANDARD AND THE ALJ'S DECISION

The Social Security Act (the "Act") defines disability, in part, as the inability to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). An individual is considered disabled under the Act:

> only if [her] physical or mental impairment or impairments are of such severity that [s]he is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which [s]he lives, or whether a specific job vacancy exists for [her], or whether [s]he would be hired if [s]he applied for work.

42 U.S.C. § 1382c(a)(3)(B). *See generally Bowen v. Yuckert*, 482 U.S. 137 146-49 (1987).

In determining disability, the Commissioner follows a five-step protocol, described by the First Circuit as follows:

> First, is the claimant currently employed? If [s]he is, the claimant is automatically considered not disabled.
>
> Second, does the claimant have a severe impairment? A "severe impairment" means an impairment "which significantly limits the claimant's physical or mental capacity to perform basic work related functions." If [s]he does not have an impairment of at least this degree of severity, [s]he is automatically considered not disabled.
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> Third, does the claimant have an impairment equivalent to a specific list of impairments in the regulations Appendix 1, Subpart P, Regulation No. 4? If the claimant has an impairment of so serious a degree of severity, the claimant is automatically found disabled.
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> . . . .
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> Fourth, . . . does the claimant's impairment prevent [her] from performing work of the sort [s]he has done in the past? If not, [s]he is not disabled. If so, the Agency asks a fifth question.
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> Fifth, does the claimant's impairment prevent [her] from performing other work of the sort found in the economy? If so, [s]he is disabled; if not [s]he is not disabled.

Goodermote v. Sec'y of Health & Human Servs., 690 F.2d 5, 6-7 (1st Cir. 1982).

In the instant case, the ALJ found as follows with respect to these questions: that Plaintiff has not engaged in any substantial gainful activity since the alleged onset of her disability (question one); that Plaintiff's impairments of depression and anxiety are "severe" but do not meet or medically equal any of the listed impairments in the regulations' Appendix 1 (questions two and three); that Plaintiff is unable to perform the work she has done in the past (question four); but, considering Plaintiff's age, education, work experience, and residual functional capacity, there are jobs that exist in

significant numbers in the national economy that Plaintiff can perform (question five). As a result, the ALJ determined that Plaintiff is not disabled.

B. PLAINTIFF'S CHALLENGE TO THE ALJ'S DECISION

Plaintiff essentially makes two arguments in support of her assertion that the ALJ's decision was not based on substantial evidence. First, Plaintiff contends that the ALJ failed to properly consider the findings of a treating source, Ms. Schliapnik, who purportedly documented Plaintiff's severe impairment and inability to work. Second, Plaintiff argues that the ALJ failed to credit certain testimony of the vocational expert that there are no jobs available for Plaintiff due to her mental condition. For his part, the Commissioner asserts that the ALJ's decision is based on substantial evidence and not predicated on any error of law. For the reasons which follow, the court finds the Commissioner's arguments more persuasive.

1. Treating Source

The ALJ found that Plaintiff had severe impairments of depression and anxiety but determined that her symptoms lacked continuity for a continued period of time to be considered disabling to the degree she alleged. Plaintiff argues that, in coming to this conclusion, the ALJ failed to consider the opinion of Ms. Schliapnik, her treating therapist at the Mount Tom City Clinic. Specifically, Plaintiff asserts, the ALJ improperly discounted Ms. Schliapnik's letter of November, 4, 2005, which, Plaintiff claims, documented her inability to work. The court disagrees.

Generally, an administrative law judge will give controlling weight to opinions from a claimant's treating source on the issue of the nature and severity of an

impairment if those opinions are supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with the other substantial evidence of record. *See* 20 C.F.R. § 416.927(d)(2) (2007). An administrative law judge can appropriately discount a treating physician's opinion when the opinion is internally inconsistent or inconsistent with other evidence in the record, including treatment notes and evaluations by other examining and non-examining doctors. *See Arruda v. Barnhart*, 314 F. Supp. 2d 52, 72 (D. Mass. 2004) (citations omitted)

Here, Ms. Schliapnik opined, at most, that Plaintiff's impairments would "greatly affect her functioning." This, of course, falls far short of suggesting that Plaintiff could not work. To be sure, Ms. Schliapnik noted in her intake assessment, under both "client's current life situation" and "family history and social functioning," that Plaintiff was "[u]nable to work." (A.R. at 393. 395.) As the Commissioner points out, however, these notations were not clinical observations, but simply reflections of what Plaintiff herself had reported. Moreover, the decision as to whether Plaintiff is unable to function effectively in a work environment is reserved to the Commissioner, not a treating source such as Ms. Schliapnik. *See generally Social Security Ruling* 96-5p (July 2, 1996). *See also* 20 C.F.R. § 416.927(e)(1) (2007) ("We are responsible for making the determination or decision about whether you meet the statutory definition of disability.") Thus, even if the court were to interpret Mr. Schliapnik's statements as concluding that Plaintiff was unable to work, that would be of little moment. *See Arroyo v. Sec'y of Health & Human Servs.*, 932 F.2d 82, 89 (1st Cir. 1991) (administrative law judge not required to accept conclusions of treating physician on ultimate issue of

disability); *Sitar v. Schweiker*, 671 F.2d 19, 22 (1st Cir. 1982) (similar); *Ellis v. Barnhart*, 392 F.3d 988, 994 (8th Cir. 2005) ("A medical source opinion that an applicant is 'disabled' or 'unable to work' . . . involves an issue reserved for the Commissioner and therefore is not the type of 'medical opinion' to which the Commissioner gives controlling weight") (citations omitted); *Harrison v. Barnhart*, 2006 WL 3898287, at *3 (D. Mass. Dec. 22, 2006) (similar).

In any event, the court finds that the Commissioner properly weighed Ms. Schliapnik's opinion and the evidence offered by her and appropriately found that the record as a whole lacked medical support for the inference that Plaintiff's impairment precluded her from working. If anything, the record points the other way. Other than slight limitations upon certain activities, Plaintiff's medical doctors and psychiatrists found no restrictions that would preclude her from employment. Dr. Selvarajah, in fact, had recommended that Plaintiff "try to find a job as soon as possible." Only Ms. Martinez, Dr. Lazerson, and Dr. O'Sullivan found that Plaintiff may be restricted in a work environment or that her depression or anxiety might affect her concentration and energy, and then only slightly or moderately so. These restrictions were not enough to convince the ALJ that Plaintiff could not engage in substantial gainful activity. For its part, the court cannot find that this decision was not supported by substantial evidence or was otherwise in error.

2. Vocational Expert

Plaintiff testified at the administrative hearing that she basically stopped working as early as 1990 due to a number of psychological ailments that had plagued her.

(A.R. at 412.) In particular, Plaintiff testified that she heard "voices," that her mind "gets blocked", and that she gets "panicky" while working. (A.R. at 414.) As indicated, a vocational expert also testified in response to questions by the ALJ. Plaintiff's attorney chose not to cross-examine her.

The ALJ first presented a hypothetical to the vocational expert based on Plaintiff's age, education, work experience and ability to perform medium level work with certain limitations, *i.e.*, activity involving simple tasks outside of high stress environments and involving only incidental public contact. (A.R. at 431.) The vocational expert opined that such an individual could perform jobs of an unskilled nature that were available in significant numbers in the national economy, such as dishwasher, assembler, and laundry worker. With the addition to the hypothetical of certain non-external limitations -- limited co-worker contact and no overhead reaching or lifting -- the vocational expert testified that the number of available jobs would be reduced by twenty to thirty percent (depending on the job category). (*Id.*)

The ALJ then presented a second hypothetical containing additional limitations, *i.e.*, potential problems with attention, concentration, persistence, and pace due to mental health issues associated with anxiety, depression, and panic attacks, together with the potential for the individual to be "off-task" at least fifty percent of the time. (A.R. at 432.) The vocational expert testified in response that there would be no jobs available for such a person because she would not be able to maintain a full-time work schedule on a regular basis. (*Id*.) This response, Plaintiff argues, albeit without much development, demonstrates that she is unable to do any work in the national economy

and is, therefore, disabled.

As is obvious from his decision, the ALJ concluded that the components set forth in the second hypothetical, although fairly asked, were not supported by either the medical record or Plaintiff's testimony which, in any event, the ALJ found not entirely credible. The medical evidence hinged in large part on Ms. Schliapnik's letter and evaluation which, as described, the ALJ properly discounted. This, in turn, led the ALJ to conclude that Plaintiff's statements concerning the intensity, duration and limiting effects of her symptoms were not entirely credible. Determinations of credibility, of course, lie well within the province of an administrative law judge. *See Rodriguez*, 647 F.2d at 272.

Compounding matters was the ALJ's observation that, although Plaintiff had no doubt experienced episodes of increased depression and anxiety, she would stop taking medication and cease therapy when she began to feel better. As a result, the ALJ found, Plaintiff's symptoms lacked the continuity of a severe impairment for a continued period of time. *See* 42 U.S.C. § 1382c(a)(3)(A). Again, the court cannot say that the ALJ's conclusions in this regard were not supported by substantial evidence.

IV. CONCLUSION

For the reasons stated, Plaintiff's motion is DENIED and the Commissioner's motion is ALLOWED.

IT IS SO ORDERED.

DATED: June 14, 2007

/s/ Kenneth P. Neiman

KENNETH P. NEIMAN
Chief Magistrate Judge